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Will NEPA be "An Agenda for the Future" or Will it Become "A Requiem for the Past"?: A Book Review of The National Environmental Policy Act: An Agenda for the Future

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**Will NEPA be “An Agenda for the Future” or
Will It Become “A Requiem for the Past”?:
A Book Review of
THE NATIONAL ENVIRONMENTAL POLICY ACT:
AN AGENDA FOR THE FUTURE***

Margaret A. Shannon**

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* LYNTON K. CALDWELL, *THE NATIONAL ENVIRONMENTAL POLICY ACT: AN AGENDA FOR THE FUTURE* (1998).

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INTRODUCTION

Thirty years did make a difference, but not as much expected when it comes to realizing the potential of The National Environmental Policy Act to ensure a sustainable society. On January 1, 1970 President Richard M. Nixon signed The National Environmental Policy Act¹ into law reluctantly, but knowing that the public demanded action to protect and restore environmental quality for the long term security of our society. In this book Lynton Caldwell begins with a brief retrospective critique of NEPA's origins and effects on environmental policy. For those deeply familiar or just learning the area, Caldwell catalogues the grand successes along with the missed opportunities of the past 30 years. However, Caldwell's careful analysis of NEPA's roles in the global context demonstrates how the words of a law could become reality through committed political will. His insightful and provocative analysis makes this book an especially valuable resource for serious scholars, as his grasp of political process is unparalleled.

I. Making Public Responsibility Private Virtue

Caldwell's analysis, while skeptical of current political swings, keeps faith with the optimism of three decades ago by demonstrating what kinds of political commitments and private choices are needed to realize the potential of NEPA. In 1970, having participated in the crafting of NEPA, Caldwell published a wonderful book, *ENVIRONMENT: A CHALLENGE FOR MODERN SOCIETY*, detailing the background, origins, and intentions of the then newly envisioned policy direction. In this book, Caldwell defined public policy as "prevailing decisions regarding those activities that societies will undertake, permit, or prohibit. These policies are characteristically made explicit in declarations, laws, regulations, and judicial decisions; but they are also, and perhaps more significantly, implicit

¹ National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 102, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. § 4332 (1994)).

in what people do.”² The theme of “public responsibility” characterized his analysis of the guiding principles underlying NEPA in 1970.³ What citizens did collectively constituted public environmental policy. Throughout the 1970s, public responsibility and private virtue were seen as inextricably linked in the context of environmental protection and conservation.

Today that connection between public responsibility and private virtue in the context of environmental protection has become decoupled. In their proposed Energy Policy, President George W. Bush and Vice President Richard B. Cheney dismiss conservation as a supply technology and dismiss private efforts to conserve resource consumption as merely a sign of “personal virtue” but not of value in energy policy. What a change twenty years can make. The end of the 1970s saw government demand that business shoulder the burden of the consequences of toxic waste sites,⁴ use conservation first to increase energy supply,⁵ and protect the Arctic Wildlife Refuge from energy exploration.⁶ The policy shift toward increased resource consumption was palpable during the Reagan-Bush years. While environmental protection returned under Clinton, the booming economy gobbled resources and consumed energy. Now, as Ellen Goodman observed, the conservatives’ call for a return of private virtue in drug prevention, pregnancy prevention, and faith-based social welfare does not seem to apply to high levels of energy consumption, which is labeled as “the blessed American way of life” by the Bush Administration.⁷ In the Bush proposals for energy policy, institutional protections of environmental quality are viewed as burdens to be removed to promote increased supply and personal

² LYNTON K. CALDWELL, *ENVIRONMENT: A CHALLENGE FOR MODERN SOCIETY* 1 (1970).

³ *Id.*

⁴ 42 U.S.C. §§ 9601-9675 (1994).

⁵ Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. 96-501, 94 Stat. § 2697 (1980) (codified at 16 U.S.C. 839 (1994)).

⁶ Alaska National Interest Lands Conservation Act of 1980 § 1003, Pub. L. 96-487, 94 Stat. § 2371 (1980) (codified at 16 U.S.C. 3101 (1994)).

⁷ Ellen Goodman, Editorial, *Public Virtue and the Environment*, BUFFALO NEWS, May 21, 2001, at B-5.

choices to drive SUVs and run air conditioners fueled with tax rebates and reductions designed to increase consumption. But only by overriding the national environmental principles embodied in NEPA can these policies go forward.

For ten years following NEPA's passage, public environmental policy reshaped the calculus of decision for public works, natural resource use, and pollution control. Efforts to limit NEPA's reach in 1980 by the Reagan administration were thwarted by the simple fact that most provisions in the just drafted regulations⁸ reflected the outcome of a decade of Supreme Court decisions.⁹ During the 1980s, public environmental policy connected to other policy sectors: human rights, labor, gender equality, and indigenous peoples. The 1992 United Nations Conference on Environment and Development addressed these issues as part of the framework for international environmental policy.¹⁰

“Preamble to Agenda 21:

1.1 Humanity stands at a defining moment in history. We are confronted with a perpetuation of disparities between and within nations, a worsening of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which we depend for our well-being. However, integration of environment and development concerns and greater attention to them will lead to the fulfillment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future. No nation can achieve this on its own; but together we can—in a global partnership for

⁸ 40 C.F.R. §§ 1500-1508 (2001).

⁹ See generally FEDERAL ENVIRONMENTAL LAW: THE USER'S GUIDE (Olga L. Morrow & Andrew L. Fono eds., 1997) (discussion of NEPA is found in Chap. 2 at 48-88).

¹⁰ AGENDA 21: THE EARTH SUMMIT STRATEGY TO SAVE OUR PLANET 28 (Daniel Sitarz ed., 1993).

sustainable development.”¹¹

However, during the 1990s, such issues slid silently from view in the rush to build global trade agreements. Recent protests in Seattle, Washington D.C., and Montreal accompanying global economic summits are again raising some of these issues. But the fences surrounding the meetings seem to have cordoned off these issues as effectively as they did the protesters. Thus, it may be that the democratizing principles that gave rise to NEPA and inspired the world summits on the environment over the past three decades are reduced to rhetoric parroted by global trade agreements rather than principles for “public responsibility.” The Energy Plan unveiled by the Bush Administration attempts to undo the policy shifts of NEPA and the environmental laws of the 1970s so as to reinstate the pursuit of private economic profit as an overriding government policy objective through requiring an “Energy Impact Statement” for any federal action or expenditure.

II. Taking Public Responsibility Seriously

As Lynton Caldwell reminds us, societal demands for protecting environmental quality are part of the history of nearly every society, now and in the past. Many of our legal institutions reflect the efforts of the last 4000 years to stem the loss of environmental quality, especially when it affected human lifeways. Two thousand years ago, Roman law recognized the *res publica* and applied these public rights to waterflows, waterbodies, coastal areas, beauty, sunshine, oceans and so on—defining them as public commons. U.S. legal institutions maintain these distinctions and often recognize a public trust duty to protect them. Caldwell argued in 1970 that the “environment has now become a new factor in public policy, because man’s practical relationship to the Earth has been changed fundamentally by his use of science and technology.”¹² He

¹¹ *Id.*

¹² Caldwell, *supra* note 2, at 1.

began his 1970 book noting that people have always affected their environment and that policy has selectively addressed environmental aspects since antiquity. Yet, it is possible to see just how much was already in play in terms of social change and with the fortune of hindsight recognize the prescience of his theses introduced in his 1970 book.

“This first section ... develops the theses (1) that a positive public policy to protect the quality of the human environment has now become a practical necessity, (2) that a maturing science of ecology can provide the informational basis for public environmental policy, and (3) that the spaceship provides a simplified, dramatic, and persuasive symbol of man’s environmental condition.”¹³

What was different in 1970 as compared to centuries past was a public reaction to how the very structure of both the economy and the government worked. At the time, Caldwell argued that “public responsibility” for the state of the environment was expressed through the burgeoning environmental movement and its numerous new organizations. While the scope of environmental policies had been gradually expanding and gaining strength for several preceding decades, environmental protection remained an afterthought when it came to economic development or maximizing the commodity values of natural resources. In 1965, Peter Drucker made the connection between environmental quality and government when he wrote: “[b]ut long before we can hope to come to grips with the city as a human environment, we will have to come to grips with the city as a government.”¹⁴ In 1967, John Kenneth Galbraith wrote a satirical essay arguing that pollution and urban decay were essential elements of the economic system.¹⁵ These were just two most prominent of the

¹³ *Id.*

¹⁴ Peter Drucker, *American Directions: A Forecast*, HARPERS MAGAZINE, Feb. 1965, at 39-45.

¹⁵ J.K. Galbraith, *The Polipollutionists*, THE ATLANTIC, Jan. 1967, at 52-54.

numerous critics during the decade of the greatest growth in productivity and per capita income in the history of the world.

The 1960s were a caldron of sociolegal debate touching issues of scenic protection, educational and racial inequality, the war in Vietnam, the “free speech movement,” participation in decisions of public institutions, demands for accountability in public decisions and expenditures, and so on. Then the public tide turned when a river in Ohio caught fire and an oil slick covered the beaches of Santa Barbara. It was in this political, social and economic environment that NEPA emerged as both a statement of public responsibility for the environment and society and a reform of what factors must be taken into account when making public decisions and allocating public expenditures. Today, a literal reading of NEPA—always an enlightening exercise!—shows clearly the efforts to reform normal administrative routines to realize real change in policy and action.

Caldwell reminds us that NEPA represented a positive step towards an affirmative national policy of “public responsibility” for the environment. Section 101 is a statement of enduring principles that continue to be reflected in international agreements, conventions, and treaties. It is a statement of societal responsibility and defines the bounds of ethical decisions in public policy. It is, therefore, uncomfortable for both government agencies and businesses alike who want to pursue economic development without taking account of environmental costs and consequences. The legal history of Section 101 principles is disappointing at best.¹⁶ Early Supreme Court cases declared these policy principles to be vague and difficult to use to evaluate action.¹⁷ The use of precedents in the legal system

¹⁶ RICHARD N.L. ANDREWS, ENVIRONMENTAL POLICY AND ADMINISTRATIVE CHANGE: IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT 158-59 (1976).

¹⁷ See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978) first suggested this “purely procedural” interpretation of the Act, but did not squarely so hold. *Stryckers Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980) did hold that after an agency considers the environmental consequences of its actions, “NEPA requires no more,” although there was still some question about whether an agency could action could be so environmentally irresponsible as to be “arbitrary and capricious” under NEPA. This possibility was dealt a severe

rendered future proposals free from the duty to demonstrate that they promoted these national principles of environmental care. The failure of agencies to follow NEPA's direction to "review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance..."¹⁸ with NEPA led to political gridlock when environmental protection requirements conflicted with resource production demands.¹⁹

In addition to the statement of principles found in Section 101, NEPA focused on reforming government, leaving to other statutes the role of reforming the private sector.²⁰ However, NEPA affected all "[f]ederal plans, functions, programs, and resources..."²¹ since federal expenditure of funds was included within the scope of NEPA which brought environmental accountability into the analysis when federal funds were spent by private entities. Prior to NEPA, agencies were generally in competitive relationships and unable to work in collaboration with one another. Each federal agency had its own creation mandate and viewed it as sacrosanct turf. Agencies sought to expand their territory and their budgets in any way possible. The 1960s had simultaneously expanded the jurisdiction of federal

blow in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989), which held that NEPA requires neither the mitigation of adverse environmental impacts of federal actions, nor agency analysis of how it could mitigate those impacts.

¹⁸ National Environmental Policy Act of 1969 § 103, 42 U.S.C. § 4333 (1994).

¹⁹ Lynton K. Caldwell, Charles F. Wilkinson, & Margaret A. Shannon, *Making Ecosystem Policy: Three Decades of Change*, 92 J. OF FORESTRY 7, 7-10 (Apr. 1994).

²⁰ See e. g. Clean Air Act Amendments of 1970, 42 U.S.C. §§ 7401-7671(q) (1994 & Supp. 2001), Clean Water Act of 1977, 33 U.S.C. §§ 1251-1387 (1986 & Supp. 2001), and the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1999) (These and the other environmental statutes of the 1970s focused on reforming the relationships between federal agencies, states and localities as well as the conditions for private action).

²¹ National Environmental Policy Act of 1969 § 101(b), 42 U.S.C. § 4331(b) (1994).

agencies over outdoor recreation, wild and scenic rivers, wildlife conservation, wilderness, and water planning while demanding ever-greater quantities of commodity production of wood products, forage for livestock, water production, and game animals. Not even the bounty of the vast public lands could supply all these needs without conflict. Coming at the end of the decade, NEPA sought to refocus agencies on cooperation, consultation, and greater openness in the planning and decision making processes.

The 1970s was surely the “environmental decade” with dozens of statutes passed ranging from comprehensive pollution control to positive public land management. The small opening for public review of the Environmental Impact Statements (EIS) found in NEPA²² opened the floodgates for public participation in all aspects of environmental policy, including enforcement through the citizen suit provisions. What took more time to lead to real change was the requirement that “[p]rior to making any detailed statement, the responsible Federal official shall consult with and obtain the commitments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.”²³ As discussed below, only the total policy gridlocks of the 1990s regarding endangered species protection finally led to interagency consultations *prior* to developing agency proposals. However, currently there is growing interest in finding ways to make the “NEPA process” more collaborative across not only federal agencies, but also state and local agencies, non-government associations (NGO), and private landowners. The Western states have adopted the *Enlibra Principles* that commit them to finding collaborative relationships among themselves, federal partners, NGOs, and private landowners.²⁴ Indeed, collaboration, collaborative planning, ecosystem management, and sustainability are all common terms of reference in environmental policy today and when one

²² National Environmental Policy Act of 1969 § 102(C), 42 U.S.C. § 4332(C) (1994).

²³ 42 U.S.C. § 4332(C).

²⁴ *Policy Resolution 99-013: Principles for Environmental Management in the West*, at <http://www.westgov.org/wga/policy/99/99013.htm> (June 15, 1999).

searches the roots of this change, one returns the simple words of NEPA.

III. Will NEPA Provide *An Agenda for the Future*?

Lynton Caldwell believes that it should, but the question of political will always looms throughout his careful and detailed analysis. Caldwell gives a clear and cogent analysis of what aspects of NEPA have been underutilized or purposefully obfuscated, through the exercise of political will not to implement its clear meaning. Caldwell examines why this occurred and then looks to ways in which the meaning and intent of NEPA might be realized in the future. At no time in this analysis does Caldwell think that NEPA has failed to accomplish much that it intended. Indeed, the signs of its positive effects abound. But he does point regularly to the ways in which the political process, administrators and especially the courts put limits and brakes on NEPA's reform efforts to protect ensconced interests—often the interests of U.S. agencies in areas of defense and national security. It is in the international arena that Caldwell finds the most to criticize in terms of government's active avoidance of NEPA's requirements and also where he finds the most hopeful signs and opportunities for this to change in the context of increasingly global environmental commitments.

Understanding how NEPA has influenced policy and action is a very complex because the ideas that shaped NEPA came from new scientific perspectives, new claims for participatory processes, new demands for transparency in policy making, new efforts to rationalize planning and measure accountability, and new technologies for information management. At the same time, bureaucracy was under attack as an inflexible form of organization when flexibility was demanded in response to new information. Public outrage with entrenched policies gave rise to demands for adaptive policy and decision processes with continuous monitoring and change. Frustration with administrative fiefdoms prompted calls for integration of policy across sectors and integrated implementation of joint action across agencies. And, the constant solving of last

week's problem, led to new forms of management and leadership based upon anticipatory action in advance of problems. While all these forces were nascent in 1970, over the last thirty years they have come to define the environmental policy arena both in the U.S. and globally.

During the 1990s, the conflict between environmental protection and resource consumption affected not only the pollution control arena, but also the management of the federal forest lands. The rapid harvest of federal forests, especially the softwoods of the Pacific Northwest which fueled the surge in private homebuilding beginning in the 1950s, finally ran into small, heretofore insignificant, (non-game) wildlife species, like the infamous Northern Spotted Owl. The conflict between the sector of the forest industry reliant upon federal timber and the preservation of critical habitat for endangered species resulted in policy gridlock by 1990. President William J. Clinton promised to solve this gridlock in 1992, and in April 1, 1993 he presided over the "Forest Conference" that brought together all the various contending interests in this complex issue. At the end of the day, he ordered a group of scientists to undertake developing a management solution to this problem that he would designate as the policy governing all of the public lands in the western part of the federal lands in Washington, Oregon, and California. Nearly as an afterthought, at the insistence of the scientists, an agency run EIS process was convened that ran parallel to the work of the scientists. In this odd and totally unique process, the President's Northwest Forest Plan was crafted and a new interagency implementation structure created to carry it out.

The Forest Ecosystem Management Assessment Process leading to the Northwest Forest Plan was the beginning of the end of the traditional way federal agencies did business with each other.²⁵

²⁵ Forest Ecosystem Management Assessment Team, *FOREST ECOSYSTEM MANAGEMENT: AN ECOLOGIC, ECONOMIC, AND SOCIAL ASSESSMENT* (1993). To read about the process, see K.N. Johnson, J. Holthausen, J. Sedell, & M.A. Shannon, *The Forest Ecosystem Management Assessment Report*, in *AT THE CROSSROADS OF SCIENCE, MANAGEMENT AND POLICY: A REVIEW OF BIOREGIONAL ASSESSMENTS*, 85, 85-115 (K.N. Johnson et al. eds., 1999). See generally

Propelled by new science—especially landscape ecology and conservation biology—resource management through simple allocation algorithms was replaced by landscape-scale, integrated ecosystem management. While Caldwell argued for an ecosystem approach in 1970,²⁶ it took two decades before the Forest Service declared it policy on June 4, 1992 in a letter to the agency from the Chief of the Forest Service which was presented to the Earth Summit as a U.S. contribution to global sustainability. By the end of the 1990s, it was clear that existing legal rules under 1970s public land statutes for resource management planning were no longer adequate. In 1998, the Secretary of Agriculture convened a committee of thirteen scientists to develop a new conceptual framework for forest planning in the Forest Service.²⁷ Their report provided the conceptual basis and general principles for the Forest Service to write new planning regulations.²⁸ These regulations were published in final form in the Federal Register on November 9, 2000.²⁹ The Bush administration appears to be attempting to undo them by declaring the analytical procedures for assessing and managing wildlife species to be too cumbersome.³⁰

Developing Forest Policy: The FEMAT Model, 92 J. OF FORESTRY 4 (Apr. 1994) (this volume provides background and substance of the FEMAT report. The article contains brief summaries of all the chapters as well as critiques of the process).

²⁶ Lynton K. Caldwell, *The Ecosystem as Criterion for Public Lands Policy*, 10 NAT. RES. LAW J. 203, 203-220 (1970).

²⁷ The author served on this committee. The committee created a report called *Sustaining the People's Lands: Recommendations for the Stewardship of the National Forests and Grasslands*.

²⁸ Committee Of Scientists, U. S. Dep't. of Agriculture, *Sustaining the People's Lands: Recommendations for Stewardship of the National Forests and Grasslands into the Next Century*, at <http://www.fs.fed.us/news/science/> (Mar. 15, 1999).

²⁹ National Forest System Land and Resource Management Planning, 65 Fed. Reg. 67,513 (U. S. Dep't of Agric. Nov. 9, 2000) (codified at 36 C. F. R. §§ 217, 219).

³⁰ An internal report dated April 10, 2001 was requested by the U. S. Dep't of Agriculture and puts forward the argument that these new rules are not implementable. This report was posted briefly on the Forest Service web site and then removed. The report is titled *NFMA Planning Rule Review: A Report*

The 2000 Forest Service planning rules, however, encompass for the first time the new science, new administrative practice, new policies, new organizational forms, new concepts of adaptive management and monitoring, new international criteria for assessing sustainability.³¹ Most importantly, for the first time NEPA's Section 101 principles are incorporated into federal regulations: "[d]uring collaborative efforts, responsible officials and other Forest Service employees, must communicate and foster understanding of the nation's declaration of environmental policy as set forth in Sec. 101(b) of the National Environmental Policy Act...."³² Then the NEPA principles are restated in their entirety and form part of the basis for ascertaining whether the management of the federal forests is consistent with sustainability. What will happen when these regulations are utilized in litigation is totally unknowable at this point. However, the policy changes in the Pacific Northwest were taken largely in response to the requirements in these same regulations for specific characteristics of the habitat—not just the designation of habitat as the Endangered Species Act (ESA) requires. Thus, we might expect that this codification of the NEPA principles as the measure of achieving sustainability might just propel the implementation of NEPA ahead in coming years.

The last three chapters of the book focus on the promise for NEPA to shape United States international policy more affirmatively. Caldwell discusses each of the general policy arenas in a level of detail providing a wonderful reference for scholars and students. Caldwell shows how widespread many of the basic principles of NEPA have become over the past thirty years—more than eighty-five

Requested by USDA, Apr. 2001, submitted by L. Larson, B. Breazeale, S. Brink, K. Hauser, G. Pierson to D. Tenny, Acting Deputy Undersecretary for Natural Resources and Environment, U. S. Dep't of Agriculture. Based on this report, a revised rule is apparently being drafted by a small group of agency planners and will be released for public comment sometime in Fall 2001.

³¹ National Forest System Land and Resource Management Planning, 36 C.F.R. §§ 217, 219 (U. S. Dep't of Agric. Nov. 9, 2000), *available at* <http://www.fs.fed.us/forum/nepa/rule/fedreg.pdf>.

³² 36 C.F.R. § 219.12(b)2.

countries have adopted NEPA in nearly its totality as the foundation of their own environmental laws. These statements of common principles help to support efforts to develop binding frameworks on specific resources or environmental protection issues. Questions of whether to adopt a global requirement for an environmental impact statement have been considered by the UN Environment Programme.³³ Requiring the Department of Defense to be subject to the requirements of the ESA has made their EISs necessarily more substantive and includes areas not on U.S. soil. Caldwell provides clear analysis of these dynamics and his summaries can provide research questions for years to come.

CONCLUSION

IN *THE NATIONAL ENVIRONMENTAL POLICY ACT: AN AGENDA FOR THE FUTURE*, Caldwell not only shows that “NEPA is more than rhetoric—it mandates coordinative procedures by the Federal agencies and it democratizes Federal planning and decision-making that significantly affect the environment,” but also that its real power is as an “articulation of values and goals.”³⁴ What seems to puzzle Caldwell most is why, with nearly 80% of Americans consistently in support of environmental protection, have these goals not been more fully realized in U.S. public policy and why have the plain requirements of the law never fully been implemented. While as a political scientist and student of public administration, Caldwell provides the analysis in this book that demonstrates how these goals were ignored when they should have guided policy and what parts of the law have never been followed, it is more difficult to explain why beyond the narrow self-interest of agencies and policy sectors. The question of political will arises repeatedly and the reader is left to wonder both what is meant by “political will” and who might actually demonstrate some of it! What the reader gains is both a very concise

³³ LYNTON K. CALDWELL, *THE NATIONAL ENVIRONMENTAL POLICY ACT: AN AGENDA FOR THE FUTURE* 116 (1998).

³⁴ *Id.* at xiv.

and specific analysis of exactly what opportunities have been lost and what aspects of the law ignored, along with the same question that nags at Caldwell more than thirty years after helping to craft this diminutive yet powerful statute: why?